



National Mining Association
Foundation For Environmental Stewardship



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David S. Guzy
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Royalty Management Program
Building 85, Room A-613
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Dear Mr. Guzy:

RE: Proposed Rule on Administrative Appeals Process

On January 12, 1999, the Minerals Management Service (MMS) proposed to amend its regulations governing procedures for appeals of MMS orders. (64 Fed. Reg. 1930.) This letter sets forth the National Mining Association's (NMA) comments on the proposed regulations. NMA's members are producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to mining.

As a general matter, NMA supports the agency's efforts to reduce costs and time associated with a lengthy appeals process. NMA however, does not believe the proposed rule will address these problems in an equitable or supportable manner. NMA's more significant concerns with the proposal are discussed below.

PROPOSED CHANGES WILL NOT ACHIEVE STATED GOALS

The primary goal of the proposed regulations is "timely and efficient resolution of appeals." The regulations would implement many of the recommendations of the Royalty Policy Committee (RPC), a committee convened to provide advice to the Secretary on the Department's management of federal and Indian mineral leases, revenues, and other minerals-related policies. In several key respects, however, the proposal deviates from the RPC's recommendations, resulting in a more convoluted appeals system than the current unworkable system the RPC Appeals Subcommittee was established to reform.

Appeals Should Be to the IBLA

NMA, therefore objects to both the proposed appeals process and de facto retention of the current two-level appeals process with amendments. To achieve timely and efficient resolution of appeals, once a demand letter or order is issued, any party to the case should be able to appeal directly to the Interior Board of Land Appeals (IBLA). The original intent of the RPC Appeals subcommittee was to restructure the current system to an appeals format which is similar to all other appeals within the DOI, such as BLM appellate procedures before IBLA. The MMS should no longer be able to take jurisdiction at any point during the appeal. In order to facilitate the appeals process, MMS should play no part in deciding the appeal. The idea behind developing these regulations was to eliminate appeals to the MMS Director and allow appeals of MMS orders to proceed directly to IBLA.

MMS Director Should Not Be Able to Take Jurisdiction of the Appeal

Proposed section 4.929 allows the MMS director to "concur with, rescind, or modify an order or decision not to issue an order" within 60 days after receipt of the record developed under proposed section 4.919 or 4.920. This section is not necessary and while it may work to aid an appellant by resulting in a rescission or modification of an order in his favor, appellants would be better served by speedy resolution of their appeal by one body, IBLA. In addition, MMS has unlimited time to conduct internal review prior to issuing the order. This provision does not provide certainty to the appeals process and would also permit MMS to change the basis upon which an order is issued midstream. If the order is modified and addresses issues not currently in the record, the appellant may be forced to try to obtain permission to supplement the record. Not only does the proposal set up impediments to obtaining such permission (see *infra*), but also would require the appellant to agree to extend the 33-month time limit, so once again timely resolution slips out of the appellant's reach.

33 MONTH TIME FRAME NOT APPLIED IN A REASONABLE MANNER

The proposed rule would accommodate time frames established by Congress in the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA) (Pub. L. 104-185, 110 Stat. 1700). The RSFA amended the Federal Oil and Gas Royalty Management Act by adding a new section governing the Department of the Interior's (DOI) process for resolving appeals of MMS orders or decisions involving royalties and other payments due on Federal oil and gas leases. For such appeals, DOI has 33 months from the date a proceeding is commenced to complete all levels of administrative review or the appeal will be deemed decided. The law does not require application of the 33-month deadline to appeals involving Indian leases or Federal coal or other solid mineral leases.

Secretary Babbitt's September 22, 1997, letter to the RPC on its recommendations, notes the 33-month appeals period should apply to all appeals. Paragraph 4 of the letter states that the

Department "agrees with most aspects of the appeals process proposed by the [RPC] Committee ... in particular ... time limits for **all appeals**." (Emphasis added.)

In this context, the proposed rule applies the 33-month time frame to all MMS appeals but then refuses to take this decision to its logical conclusion. While the 33-month deadline would apply to solid minerals such as coal, the way the rule is currently written, the 33-month period is a goal rather than a requirement. After the 33-month period expires, there are no sanctions for appeals relating to solid mineral leases. In contrast, for oil and gas leases (as required by RFSA), if a decision has not been issued within 33 months, the appeal will be deemed decided in favor of the appellant as to any nonmonetary obligation and any monetary obligation less than \$10,000. A final decision will be deemed issued in favor of the Secretary for monetary obligations greater than \$10,000.

For uniformity of administration, MMS must apply the 33-month IBLA decision time frame **and a default provision** across the board to all appeals, not just appeals relating to oil and gas leases. MMS has the authority on its own initiative to establish time frames for appeals and it would not be inconsistent with RSFA to apply a default provision associated with the 33-month time frame to all leases. NMA proposes that for appeals other than oil and gas, sections 4.912, 4.948 and 4.956 be revised to clarify that if a decision is not rendered by the end of the 33-month period, the appeal must be deemed denied, thereby constituting an exhaustion of administrative remedies. To have a default provision apply only to appeals involving royalties under oil and gas leases creates serious equity concerns. For example, the IBLA (with existing backlogs in excess of 18 months), would be forced to elevate oil and gas royalty appeals over all other royalty appeals including coal and solid mineral royalty appeals. While statutory changes may have created this inequity, MMS can create an even playing field by making the 33-month time frame with a default provision applicable to all royalty appeals. Since IBLA has stated that it could handle the processing of coal appeals within the 33-month appeal period, MMS has no valid reason not to apply a default provision.

MMS' cursory discussion of why it is not applying a default provision for all appeals does not address these equity concerns. The preamble to the proposed rule merely states: "Although we plan to use the same time frames to process Indian, solid mineral, and geothermal appeals, we do not plan to impose this section's default rule of decision on those appeals. We believe that the benefits of obtaining IBLA review and decisions outweighs industry's desire for a quick, mandatory decision." 64 Fed. Reg. 1949. Thus, the appeals process will be incredibly incongruous. Mandatory obligations appear throughout the proposal requiring all appellants wishing to seek an extension of any procedural step or requirement, to expressly agree to extend the 33 month appeal period and execute an Extension Agreement each time to this effect. Obviously, there should be no reason to do so if there are no applicable sanctions with respect to concluding the appeal within the 33-month appeal period. If the purpose of applying the 33-month appeal period for solid minerals is merely for the Department's use "as guidance to track the appeal under section 4.948," then coal lease appellants are no better off under the proposal

than under the current appeals framework. MMS must apply the 33-month appeals period with the default provision suggested above to all non-oil and gas appeals.

ORDERS

Preliminary Determination Letter

Proposed section 242.102 provides that MMS "may" send a "preliminary determination letter" if it believes the payor has not properly provided information related to the lease or reported or paid royalties or other payments due under the lease. NMA supports this provision and agrees with the RPC report that it is extremely important to seek to resolve issues informally at the earliest possible stage in order to avoid unnecessary administrative appeals and litigation. To that end, it should be mandatory for MMS to send a preliminary determination letter in cases where the proposed royalty demand exceeds, for example, \$10,000.

Definition of "Order"

Section 4.903 contains the proposed definition of order. NMA objects to subsection(2)(i)(B), which states that an order does not include "advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language." This language contradicts MMS' own regulations at 30 C.F.R. 206.257(f), "Request for Valuation Determination," which treats such requests as appealable orders. MMS may not proceed with this backdoor attempt to obviate its current regulations through changes to a definition in its appeals regulations.

Orders to Provide Documents or Information Are Immediately Appealable in Federal Court

NMA supports MMS's decision in proposed section 4.905(b) to make final "orders to provide documents or information issued under 30 C.F.R. 242.104(b)(4)," allowing the recipient of such an order to proceed directly to federal district court.

Orders must Cite Authority and Basis for Demand Letter

Proposed section 242.105(a)(2) states an order must include "the factual findings and the legal or policy basis for the order." NMA agrees strongly with this statement, included at the recommendation of the RPC; the burden should be on MMS to provide such information. Fundamental fairness dictates that once the basis for the demand letter or order has been identified, MMS should not be able to identify any other basis later during the proceedings.

FILINGS NECESSARY TO COMMENCE AN APPEAL

Proposed section 4.911 provides that an appeal will not commence until the appellant submits: 1) a written Notice of Appeal; 2) a written Preliminary Statement of Issues specifically identifying the legal and factual disagreements you have with the order or MMS decision not to

issue an order and 3) a \$150 nonrefundable processing fee. NMA has concerns regarding the proposed regulations relating to the written Preliminary Statement of Issues and to the processing fee.

Notice of Appeal

The notice of appeal should be sufficient to effectuate the commencement of an appeal. No other filings should be necessary, and no other undertaking is required by RSFA to constitute the filing of an appeal.

Preliminary Statement of Issues

First, NMA objects to the requirement that receipt of the Preliminary Statement of Issues is a precondition to the "commencement" of an appeal for the purposes of the 33-month time frame. Second, the Preliminary Statement of Issues requires too much detail at an early stage in the appeals process. According to the example Preliminary Statement of Issues (Appendix A to Subpart J of Part 4), the statement should include citations to applicable case law, statutes, and/or regulations. At the time the appeal is filed, the party will not yet have had time to develop such information. Also, requiring such information in the Preliminary Statement is contrary to the Secretary's direction in his September 22, 1997, letter to the RPC on its recommendations. In paragraph 4(a) of that letter, the Secretary stated that the Preliminary Statement "should not be a legal brief, providing detailed analysis and citations." Any references to requiring detailed information on case law, statutes and regulations should be eliminated from the proposed Appendix A.

Processing Fee

Regarding the \$150 processing fee to initiate an appeal, NMA believes MMS should not be entitled to charge a filing fee in a procedural process which the MMS Director has publicly stated is not truly an appellate process, but is only an internal MMS review mechanism. Also, the MMS should not be entitled to charge a filing fee where the appeal is ultimately deemed denied. Under the Independent Offices Appropriation Act, fees charged are at least in part supposed to reflect the benefits to the recipient. In the case where an appeal is not acted on in a timely matter, no benefit accrues to the appellant. In addition, NMA finds it ironic that an appellant would have to pay a filing fee for the "privilege" of exhausting agency created administrative remedies rather than proceeding directly to the district court, as the appellant likely would have preferred. NMA is also concerned that the filing fee could be subject to abuse or overcharging.¹

¹ Similarly, NMA objects to the requirement to pay an additional \$150.00 filing fee at the time of submission of the statement of reasons.

RECORD DEVELOPMENT

Record Development Should Not Include Obligation to Provide Information Adverse to the Party's Position on Appeal

Section 4.918(b) requires that "at the record development conferences, the parties must identify all documents and evidence that are relevant to disputed legal or factual issues that are involved in the appeal. . . ." The preamble language pertaining to this section goes much further, identifying relevant information as including "information adverse to the party's position on appeal that the party is aware of, and that was considered in determining the party's position that is not privileged or prohibited by law. 64 Fed. Reg. 1939. This language appears to mandate self-incrimination and should be deleted; the payor should not have to assist the MMS in making out its case against the payor.

Certification of Record Contents

Section 4.919(a)(3)(iii) requires that when all parties agree on the record contents, each party jointly or individually must certify that the record is complete. Mandating such complete certification goes beyond the RPC recommendation to file a **good faith** certification of completeness. NMA objects to the proposed certification requirement unless the rule also provides great flexibility in supplementing the record. As discussed below, the proposed rule makes it difficult to supplement the record.

Supplementation of Record

Section 4.923(b) allows parties to supplement of record or Statement of Facts and Issues after the record is deemed complete only if they can demonstrate to IBLA why the additional documents, evidence, facts or issues were not available or provided in the record or in the Statement of Facts and Issues and why they are material to a decision on appeal. It is in the best interest of all parties to the case and the judiciary to have a complete record before the decision-making body, be it IBLA or at a later date Federal District Court. As is currently the case before IBLA, supplementing the record should be permitted between the time when MMS deems the record complete under section 4.919 or 4.920 and the time additional responsive pleadings are permitted under section 4.944.

NMA appreciates the opportunity to comment on this matter.

Sincerely,



Katie Sweeney